

TAB

14 November 1972

Note for JMM:

1. I believe that the Agency's attempt to tighten up on the so-called Scarbeck statute in the format of the proposed revision of the Criminal Code has created some ambiguity.
2. The attached memo attempts to identify the ambiguity, its consequence, and to suggest remedial language.
3. If the case is made to your satisfaction, I believe we should share our observations with OGC, since the provision has already been coordinated somewhat within the Executive Branch.



LLM

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13 November 1972

MEMORANDUM FOR THE RECORD

SUBJECT: Communication of Classified Information  
by Public Servant

ATTACHMENTS: A. Revision of Proposed New Section 1115  
of Title 18 U. S. C.

B. 50 U. S. C. 783(b)

1. Attachment A enlarges on existing law (attachment B) by:  
(1) broadening the class of individuals to whom communication of classified information is proscribed, and (2) broadening the class of offenders to include former public servants.

2. It could be argued that attachment A also achieves the unintended result of:

--making it a crime for any public servant (including the President or an agency head) to communicate any classified information to any foreign government, and

--nullifying any defense by a subordinate public official that such communication was specifically authorized by the President or an agency head.

These results are patently absurd in view of the President's inherent constitutional responsibilities and authorities and the fact that the statute deals solely with information which is classified under the authority of the President. Practical arguments such as these aside, a revision of the language of attachment A would remove existing ambiguities (see paragraph 5 below).

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3. These problems are not encountered in the current law (attachment B). This is because the current provision of law fully and clearly defines the offense and the parties to the offense and makes it clear that no offense is committed if an otherwise proscribed communication has been authorized by the President or an agency head. Problems creep into the proposed revision because it sets up two separate classes of recipients of the proscribed communication:

(a) "an agent or representative of a foreign government or...  
an officer or member of an organization defined in 50 U. S. C.  
782(5) (communist organizations)" or

(b) "an unauthorized person."

The first class is identical to current law and is fully and clearly defined by the proposed statutory language. The second class, "an unauthorized person," is defined only by absence of an administrative act by either the President or an agency head (i. e., "The term 'unauthorized person' means any person or agency not authorized by the President or by the head of a government agency with the approval of the President to receive such classified information."). Obviously, the phrase "an unauthorized person" is broad enough to cover foreign agents and members of proscribed organizations as well. Since, however, two separate classes are set out in the statute, there must be a meaning for their use. The most reasonable meaning is that the terms were intended to be mutually exclusive. The first class is fully and clearly defined by statutory language but the second class is defined only by the absence of an administrative act by or under the President. This then would suggest that communication to the first class is in no way subject to the administrative discretion or domain of the President and constitutes an offense even if the communication is made by the President or an agency head.

4. A related but different aspect of the same problem is its effect on the defense made available under subsection (2)(a) to a public servant or former public servant that the communication to the first class ("foreign government") was specifically authorized by the President or agency head. Neither a President nor agency head could authorize a subordinate to do what is proscribed to them. The defense, of course, would lie in the case where communication was to the second class ("an unauthorized person").

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5. Remedy. Two language changes come to mind which would ameliorate the situation:

(a) The offense could be limited to a communication to "an unauthorized person." This term could include agents of a foreign government or members of a communist organization. (The disadvantage of this approach is that (1) it highlights the change that would be effected in current law by the proposed revision, and (2) it eliminates statutory language that has been upheld by the courts.

(b) Second, and probably preferable, would be to add the bracketed language in attachment A.



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